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# In the Supreme Court

OF THE

OCTOBER TERM, 1974

No. 74-87

GEORGE MIHALOPOULOS, *Petitioner*

vs.

IDEAL CEMENT COMPANY, *Respondent*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION

### BRIEF COUNTERSTATEMENT OF QUESTIONS PRESENTED

The questions presented by the petition for a writ of certiorari are as follows:

1. Whether petitioner was deprived of any constitutional rights by not witnessing the gathering of jurors before continuation of jury deliberations on the second day.

2. Whether error was committed in the trial court by reason of an alleged incomplete transcript on appeal.

3. Whether error was committed by the trial court in not giving a brief outline to jurors of the court's instructions at the start of the second day of jury deliberations.

## STATEMENT OF THE CASE

Petitioner, a merchant seaman formerly employed as a tug deckhand aboard the Tug Lake, owned and operated by respondent, Ideal Cement Company, brought this action by a complaint in the trial court to recover damages for aggravation of a pre-existing low back condition. Jurisdiction below existed under the Jones Act. The case came on for jury trial in the court of Judge Lloyd H. Burke on January 15, 1973. Petitioner was represented at trial by John Victor Tilly, Esq. of the firm of Jennings, Gartland & Tilly. On January 23, 1973, the jury returned a unanimous verdict in favor of respondent, Ideal Cement Co. No post-trial motions were made by counsel. Petitioner filed a notice and obtained an order substituting himself *in propria persona* in the place of his attorneys on February 21, 1973, and a notice of appeal was filed the same day. Jurisdiction of the Court of Appeals for the Ninth Circuit existed under 28 U.S.C. §1291.

On May 16, 1974 the Court of Appeals for the Ninth Circuit, by a unanimous decision, affirmed the judgment in favor of respondent and rejected petitioner's assignments of error as "each of them lacks merit and is without sufficient substance to warrant discussion." (See Appendix A) There was no petition for rehearing.

On August 6, 1974, petitioner filed with this court a petition for writ of certiorari. Jurisdiction of this court is not alleged in the petition, but presumably petitioner relies on 28 U.S.C. §1254(1).

## ARGUMENT

### I. NONE OF THE STANDARD REASONS FOR GRANTING REVIEW OF A FEDERAL COURT DECISION INVOLVING FEDERAL LAW IS PRESENTED HERE.[1]

The court below has decided there were no questions of substantive federal law, much less one which requires settlement by this court. The petition does not assert otherwise. No conflict with this court or another court of appeals is present or asserted. The petition deals only with procedural matters, raising questions which are frivolous, as we show below.

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### II. THIS CASE PRESENTS NO OTHER APPROPRIATE REASON FOR A GRANT OF CERTIORARI, AS ALL OF PETITIONER'S ASSERTED REASONS ARE UNFOUNDED AND UNIMPORTANT.

#### A. Jury deliberations were under the control and supervision of the United States Marshal.

Petitioner cites as error that the jurors were not brought into the courtroom on the morning of January 23, 1973, before adjourning to an adjacent jury room to resume further deliberations. As the jury, once instructed, is thereafter left under the control and supervision of the United States Marshal, no jury deliberations could commence before all jurors were present and accounted for to the satisfaction of the Marshal, who is surely presumed to have done his duty.

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[1]Supreme Court Rule 19.1(b).

**B. The transcript presented on appeal is a correct transcript of the proceedings requested by the Petitioner.**

The only transcript requested by the Petitioner consisted of the voir dire of the jury, arguments of counsel, and a portion of the proceedings of January 23, 1973. Petitioner asserts the transcript he ordered on appeal is incomplete. The asserted instances of an incomplete transcript do not substantiate any incompleteness of the transcript of the official court reporter, but rather demonstrate the incompleteness in petitioner's request for a trial transcript.

The alleged incompleteness of the transcript is not alleged to have had any effect upon the proceedings below and, as no transcript was ordered during trial, it could have had no effect on the verdict.

**C. No outline or summary of the Court's instructions was requested or required.**

Petitioner here for the first time raises the novel assertion that error was committed by the trial court in not summarizing its previous instructions to the jury on the morning of January 21, 1973 before further jury deliberations. No request was ever received from the jury or counsel to re-read any jury instructions. No rule or statute requires the court, on its own initiative or otherwise, to review those instructions before each day's deliberations. No error can be shown from the record as a result of this assertion.

## CONCLUSION

For the foregoing reasons, and for petitioner's failure to raise special and important reasons for this court to exercise its discretionary right to review, petitioner submits that the jury verdict rendered in favor of Ideal Cement Co. was supported by substantial evidence and that the affirmance of the judgment upon that verdict by the United States Court of Appeals for the Ninth Circuit must stand. The petition for writ of certiorari should be denied.

Dated, San Francisco, California,
September 4, 1974.

GRAYDON S. STARING,
*Attorney for Respondent.*

LILLICK, MCHOSE, WHEAT,
ADAMS & CHARLES,
DAVID W. CONDEFF,
*Of Counsel.*

**(Appendix A Follows)**

## Appendix A

United States Court of Appeals
For the Ninth Circuit

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| George Mihalopoulos,<br>Plaintiff-Appellant,<br>vs.<br>Ideal Cement Company, a corporation,<br>Defendant-Appellee. | No. 73-1797<br>ORDER |

[May 16, 1974]

Appeal from the United States District Court for the Northern District of California

Before: Koelsch, Wallace and Sneed, Circuit Judges.

We have examined each of appellant's nine assignments of error in light of the record on appeal, and we conclude that each of them lacks merit and is without sufficient substance to warrant discussion. Appellant has failed to demonstrate that the judgment was other than the product of a full and fair trial by an unbiased jury; we shall not disturb it on appeal.

AFFIRMED.